

JURISDICTION OVER STATE BANKS: DOES THE BANK HOLDING COMPANY ACT PRE-EMPT STATE REGULATION?

The banks in the United States can be divided into two groups: national banks and state banks. National banks have national charters and belong to the Federal Reserve System.¹ They are insured by the Federal Deposit Insurance Corporation [hereinafter F.D.I.C.],² and are regulated by the Comptroller of the Currency.³ State-chartered banks may belong to the Federal Reserve System and may be insured by the F.D.I.C.,⁴ but their basic regulation is by local authorities.⁵ All state-chartered banks which are members of the Federal Reserve and the F.D.I.C. have to comply with the specific regulations of those particular agencies. However, this federal regulation applies only to specific areas leaving the general regulation of state banks to a state banking agency.

The establishment of branch banks is administered by the state superintendent of banks⁶ or by the Comptroller of the Currency⁷ depending on the bank's charter. The state superintendent of banks, before approving a branch application, must ascertain whether all of the state's statutory requirements for branching have been met. For example, in Ohio, banks can only open branches in the county where their principal place of business is located, and then only when the Ohio Superintendent of Banks has ascertained that the proposed institution will serve the needs and convenience of the public and has a reasonable probability of economic success.⁸

¹ All national banks are required to be members of the Federal Reserve System. See Ch. 6, 38 Stat. 251 (1913) (codified, as amended, in § 409 of 31 U.S.C. and in various sections of Title 12 U.S.C.) for the Federal Reserve Act itself. See also Hackley, *Our Baffling Banking System*, 52 VA. L. REV. 565, 566 (1966).

² Federal Deposit Insurance Act provides that all members of the Federal Reserve System are insured by the Federal Deposit Insurance Corporation. See Ch. 967, 64 Stat. 873 (1950) (codified, as amended in §§ 1728(b) and 1811-31 of Title 12 U.S.C., and in sections of Title 18 U.S.C. See also 52 VA. L. REV., *supra* note 1, at 566.

³ 12 U.S.C. §§ 1-15 (1970).

⁴ 12 U.S.C. §§ 1811-31 (1970). See also 52 VA. L. REV., *supra* note 1, at 566.

⁵ *E.g.*, OHIO REV. CODE §§ 1125.01-99 (1968).

⁶ *E.g.*, OHIO REV. CODE § 1111.02 (1968).

⁷ 12 U.S.C. § 36 (1970).

⁸ OHIO REV. CODE § 1111.03 (1968) states:

(A) No branch shall be established until the consent of the superintendent of banks has been obtained, and no bank shall establish a branch in any place other than that designated in its articles of incorporation as its principal place of business, except in a municipal corporation contiguous to such designated place, or in other parts of the county in which the municipal corporation in which the principal place

The Comptroller of the Currency, empowered by federal law to approve national branch bank formation, is bound by the same branching restrictions which apply to his state counterpart plus all federal restrictions.⁹ The incorporation of the state's branching requirements into the federal law was intended by Congress to maintain competitive equality between the two systems of banks.¹⁰

In the last few decades expansion by branching has slowed and bank growth, state and national, has been through the bank holding company.¹¹ This phenomenon is a direct result of the failure of courts and legislatures to extend the restrictions on branch banking to subsidiary banks owned and operated by holding companies.¹² Thus, if a bank wishes to expand in areas prohibited by state law it may be able to do so by creating a bank holding company and having the holding company acquire an existing bank in the prohibited area or petition for a new charter in that area.

The Bank Holding Company Act¹³ was designed by Congress to regulate holding company expansion. Pursuant to § 1842(a) of the Act,¹⁴ the formation of new holding companies and the expansion of

of business of the bank is located, provided, any bank may maintain and operate as a branch, any branch authorized prior to January 1, 1968.

(B) A bank may establish and maintain a branch outside the United States with the prior written approval of the superintendent and subject to an agreement satisfactory to the division providing for the times, method, and reimbursement of expenses of examination of such branch.

(C) In considering an application for a branch under division (A) of this section, the superintendent shall ascertain whether

(1) The convenience and needs of the public will be served by the proposed branch;

(2) The population and economic characteristics of the area primarily to be served afford reasonable promise of adequate support for the proposed branch;

(3) The proposed branch meets such other reasonable criteria as he may require.

⁹ 12 U.S.C. § 36 (1970).

¹⁰ *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). This case summarizes the legislative history which reveals the intent of Congress to preserve competitive equality.

¹¹ Note, *Federal-State Relations under the Bank Holding Company Act of 1956*, 66 YALE L. J. 1093, 1096 (1957), and Comment, *Transamerica—The Bank Holding Problem*, 1 STAN. L. REV. 658 (1949).

¹² See, *Hearings on H.R. 6227 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 84th Cong., 1st Sess. at 47-48 (1955).

¹³ 12 U.S.C. §§ 1841-50 (1970).

¹⁴ 12 U.S.C. § 1842(a) (1970) states in pertinent part:

(a) It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting share of such bank; (4) for any bank holding company or subsidiary thereof,

existing companies is forbidden without the prior approval of the Federal Reserve Board. Congress, while allocating this jurisdiction to the Board, tried to maintain the federal-state balance of bank regulation through three sections of the Act.

The first, § 1842(d),¹⁵ forbids a bank holding company from expanding across state lines under any circumstances unless the state to be entered has legislated specifically to allow foreign corporations to acquire domestic banks. The second, § 1846,¹⁶ not only reserves to the states all powers and jurisdiction over bank holding companies which they had prior to the passage of the Act, but also permits them to expand their regulation over bank holding companies. The third, § 1842(6),¹⁷ insures that the Board is informed by the relevant banking authority, state or federal, of that authority's position on the legality of the proposed holding company. This recommendation does not bind the Board. Thus the independence of the Board is preserved and both the Comptroller and the state authorities are prevented from encroaching upon the jurisdiction of the Board.

However, the question remains whether, after a Board decision contrary to the recommendation of the Comptroller or state superintendent, these officials must conform to the Board's decision in what would otherwise be a discretionary function. For example, a new national banking institution can not commence operations until the Comptroller certifies that institution.¹⁸ If that institution has been

other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company.

¹⁵ 12 U.S.C. § 1842(d) (1970) provides in pertinent part:

(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

¹⁶ 12 U.S.C. § 1846 (1970) provides:

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

¹⁷ 12 U.S.C. § 1842(b) (1970).

¹⁸ 12 U.S.C. § 27 (1970).

approved by the Board can the Comptroller deny certification? If the Comptroller is bound by the decision of the Board are the state banking authorities¹⁹ also bound when they are requested to grant charters or branch applications to banks in a holding company reorganization which has been approved by the Board?

This note will examine whether Congress intended to pre-empt the states by vesting the Board with exclusive jurisdiction over bank holding companies through an investigation of (1) the relevant state and federal case law, and (2) the legislative history of the Bank Holding Company Act.

II. RELEVANT CASE LAW

A. Federal

The Comptroller of the Currency was clearly denied the power to reverse a decision of the Board in *Whitney National Bank in Jefferson Parish v. Bank of New Orleans*.²⁰ Pursuant to § 26 of the National Bank Act²¹ the Comptroller is to determine if a banking association is entitled to commence business, but the Supreme Court ruled that this authority was subordinated to the Board's authority through Congress' allocation of jurisdiction in the Bank Holding Company Act.

In *Whitney* a national bank in New Orleans decided to try to establish a branch in an adjoining parish. The Louisiana bank law prohibited banks from establishing branches in adjoining parishes.²² The Whitney National Bank, after consulting with the Comptroller of the Currency, attempted to circumvent the state law by first forming a bank holding company and then establishing a subsidiary bank in the neighboring parish. The reorganization of Whitney into a bank holding company and the establishment of the subsidiary was approved by the Board over the objection of several competing banks.

After the Board approved the Whitney reorganization the Louisiana legislature passed a bill prohibiting the operation of bank holding companies within its borders.²³ An appeal filed by the objecting banks in the United States Court of Appeals for the Fifth Circuit was pending when the Louisiana legislature passed the prohibitory legislation. At this juncture the objecting banks filed an action and obtained a permanent injunction in the District Court for the District of

¹⁹ E.g., OHIO REV. CODE §§ 1103.07, 1111.03 (1968).

²⁰ 379 U.S. 411 (1965).

²¹ 12 U.S.C. § 26 (1970).

²² LA. REV. STAT. § 6:54 (1950).

²³ LA. REV. STAT. §§ 6:1001-6:1006 (Supp. 1974).

Columbia which barred the Comptroller from permitting the subsidiary to open.²⁴ The court of appeals upheld the jurisdiction of the district court which issued the injunction,²⁵ but the Supreme Court reversed deciding that the District Court for the District of Columbia had no jurisdiction to pass on the holding company proposal,²⁶ and that original and exclusive jurisdiction over bank holding companies rested with the Board. This decision limited the potential discretion of the Comptroller since if the jurisdiction of the Board was exclusive then the Comptroller's duties in certifying new institutions became ministerial whenever a bank holding company was involved.

This allocation of exclusive jurisdiction is based on two grounds. First, the legislative history of the Bank Holding Company Act reveals that Congress expressly rejected a provision designed to give the Comptroller a veto over a decision of the Board.²⁷ The Court noted:

[The] legislative history clearly indicates that Congress had no intention to give the Comptroller a veto over the Board in such cases. It follows that it is the exclusive function of the Board to act in such cases and contests must be pursued before it, not before the Comptroller.²⁸

The Supreme Court also observed that Congress had rejected a provision for de novo review of the Board's decisions in the district courts.²⁹ The Court concluded from this rejection of de novo review that challenges to the Board's decisions should be pursued only along the lines prescribed in the Bank Holding Company Act.³⁰

The second basis for the *Whitney* decision is grounded in several Supreme Court cases which have stated that where Congress has designed a statutory review mechanism to bring agency expertise to bear on a specific problem that mechanism is deemed to be exclusive.³¹ The Court reasons that since the mechanism outlined in the Bank Holding Company Act is designed to bring the Board's specialized expertise to bear on holding company proposals, that mechanism should be the exclusive authority. The Court in *Whitney* noted:

²⁴ *Bank of New Orleans & Trust Co. v. Saxon*, 211 F. Supp. 576 (D.D.C. 1962).

²⁵ *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963).

²⁶ 379 U.S. at 414-15.

²⁷ 101 CONG. REC. 8186-87.

²⁸ 379 U.S. at 419-20.

²⁹ *Id.* at 420.

³⁰ The correct appeal procedure is located in 12 U.S.C. § 1848 (1970).

³¹ See, *Callaman Road Improvement Co. v. United States*, 345 U.S. 507 (1953); *Far East Conference v. United States*, 342 U.S. 570 (1952); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design.³²

In sum, the fact that federal law confers certain duties on the Comptroller does not, according to *Whitney*, give the Comptroller the ability to frustrate a Board decision.³³ The legislative history of the Act rejecting the Comptroller's veto and the decision by the Congress to provide a mechanism to bring a specific agency's expertise to bear on a question indicates convincingly to the Court that the Board has exclusive original jurisdiction over bank holding company acquisitions where national banks are involved.

The court of appeals decision in *Whitney*, which was reversed on the procedural grounds mentioned above, indicated that the test for applying state branch law to the holding company acquisition was whether the operation of the holding company and the acquired subsidiary were "unitary" in structure.³⁴ In other words, if the subsidiary acted as a "de facto" branch it was to be governed by the state branching laws. These laws would be enforced by the Federal Reserve's action in evaluating holding company expansion plans.

The Board rejected this premise prior to 1973,³⁵ instead insisting that the legality of holding company acquisitions was governed by the tests set out in the Bank Holding Company Act,³⁶ which made local branching laws irrelevant. In 1973 the Board abandoned this position in their appeal in *Gravois Bank v. Board of Governors of the Federal Reserve System*.³⁷ In *Gravois* the Board conceded that it was obliged to determine if the acquisition of a bank by a holding company would result in the creation of a branch bank. If it did amount to the establishment of a branch, the Board would be obliged to apply the state law applicable to national banks under § 36 of the National Bank Act and thus determine if the establishment of the "de facto" branch was in accordance with the state law.

In *American Bank of Tulsa v. Smith*³⁸ the Tenth Circuit reaffirmed the exclusive jurisdiction of the Board over bank holding company acquisitions by requiring the Board to determine if a proposed

³² 379 U.S. at 420.

³³ *Id.* at 419.

³⁴ 323 F.2d at 303. See also, *First Nat'l Bank of Billings v. First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962).

³⁵ See *First Arkansas Bankstock Corp.*, 56 FED. RESERVE BULL. 778 (1970); *Denver U.S. Bancorporation, Inc.*, 49 FED. RESERVE BULL. 1518 (1963); *First Colorado Bancshares, Inc.*, 49 FED. RESERVE BULL. 1646 (1963).

³⁶ 12 U.S.C. § 1842(c) (1970).

³⁷ 478 F.2d 546, 551 (8th Cir. 1973).

³⁸ 503 F.2d 784 (10th Cir. 1974).

bank was a subsidiary of a holding company, and if a subsidiary, whether it was also a de facto branch. Only after the Board decided that the bank was not a subsidiary of the holding company would the Comptroller be entitled to issue the requested charter.³⁹ The court was careful to note that it did not have jurisdiction over the merits of the controversy, but that it did have jurisdiction to stay the hand of the Comptroller until the Board decided the subsidiary and branch status of the proposed bank.⁴⁰

The conclusion which follows from the *Whitney*, *Gravois*, and *American* cases is that not only does the Board have exclusive jurisdiction over holding company acquisitions involving national banks, thus eliminating any discretionary authority of the Comptroller, but the Board has jurisdiction to decide which acquisitions and reorganizations fall within the area Congress sought to regulate through the Bank Holding Company Act.

B. State Cases

The *Whitney* rationale was applied to state regulation in *Neally v. Brown*.⁴¹ The Maine supreme court in *Neally* concluded that questions of organization and operation of a bank holding company lie within the original and exclusive jurisdiction of the Board⁴² despite a Maine bank statute⁴³ requiring the State Commission of Banks to approve the creation of new state banks.

In *Neally*, Depositors Corporation, a bank holding company registered with the Federal Reserve Board, made application to establish two new trust companies. The Bank Commissioner for the State of Maine denied each application on the ground that "issuance of said certificates would be a contravention of the banking laws of the State of Maine."⁴⁴ The superior court reversed the decision of the Bank Commissioner on the ground that the applications did not contravene the branch banking law of Maine as the Commissioner contended. The Supreme Court of Maine affirmed the superior court's decision holding that the Commissioner lacked jurisdiction over bank holding company arrangements:

Congress reposed *original and exclusive* jurisdiction in the Federal Reserve Board, subject to review only by an appropriate United

³⁹ *Id.* at 789.

⁴⁰ *Id.* at 788.

⁴¹ 284 A.2d 480 (Me. 1971).

⁴² *Id.* at 482.

⁴³ 9 MAINE REV. STAT. ANN. § 993 (1964).

⁴⁴ 284 A.2d at 481.

States Court of Appeals . . . to assess and decide the propriety, —including the applicability and effect not only of federal but also of state law,—of any arrangement in which a bank holding company has a critical position of control in the organization and operation of a new trust company.⁴⁵

The *Neally* decision relies on three separate premises: first, Congress in allocating jurisdiction over bank holding companies did not differentiate between national and state banks, and therefore, the Board should have equivalent jurisdiction over both types of banks.⁴⁶ Second, the *Neally* court found support for its decision in the legislative history of the Bank Holding Company Act. The *Neally* court felt that since a veto power originally given to state banking authorities over board decisions was deleted, Congress intended the Board's decision to be final.

The Maine court also relied on those sections of the *Whitney* opinion which justify the Board's jurisdiction on the basis of agency expertise.⁴⁷ That is, since Congress designed this statutory scheme to allow an agency with expertise to evaluate the bank holding company questions, this scheme must have been intended to confer exclusive jurisdiction. The *Neally* court felt that this rationale applies with the same force to both state and national banks.

Although there is a dearth of explicit case law on this point, an examination of two other state cases highlights the problem. In *Central Bank of Clayton v. State Banking Board of Missouri*⁴⁸ the state banking board assumed that it had jurisdiction to determine in a bank chartering procedure whether the new bank's acquisition by a holding company violated the state's branching laws. The Missouri court of appeals felt that it was clear from *Neally* and *Whitney* that the Federal Reserve had exclusive jurisdiction to make the *initial* determination. However, the Missouri court, unlike the *Neally* court, failed to decide whether the state agency had jurisdiction to rule on the application of state law to the plan where the Board had already granted an application.⁴⁹ If the state has jurisdiction to rule on the application of state law, the Comptroller's jurisdiction is only exclusive as to federal authorities.

In an Ohio case, *In re Cleveland Trust Company of Lake County*,⁵⁰ the Ohio supreme court decided that a plan of

⁴⁵ *Id.* at 483.

⁴⁶ *Id.* at 485-88.

⁴⁷ *Id.* at 487.

⁴⁸ 509 S.W.2d 175 (Mo. Ct. App. 1974).

⁴⁹ *Id.* at 193.

⁵⁰ 38 Ohio St. 2d 183, 311 N.E.2d 854 (1974).

reorganization by a bank holding company which created three new charter state banks was not branching in violation of the state's geographical restrictions of branch formation. In reaching this decision the court did not discuss the jurisdictional issue except to reject *Neally* and acknowledge the concurrent jurisdiction of state courts over state law questions.⁵¹

II. ANALYSIS OF LEGISLATIVE HISTORY⁵²

The application of the Bank Holding Company Act to national banks seems clear from the *Whitney* and *Gravois* cases. Any questions involving a national bank holding company acquisition fall within the exclusive domain of the Federal Reserve Board. Even the question of de facto branching through a holding company is a question for the Board. The Board must determine whether the subsidiary is what the federal law would characterize as a branch and then whether the state branching law permits its formation. Normally this would be a question for the Comptroller, but the *Whitney* decision leaves little doubt that when in reference to a bank holding company such a question falls within the province of the Board.

Jurisdiction over state banks involved in a holding company arrangement is a more complicated matter. No one disputes that the Federal Reserve Board has initial jurisdiction over bank holding company acquisitions even when state banks are involved. However, there is a split of authority on whether a state banking agency has the power to possibly undermine a Board decision by disapproving, on state law grounds, a plan which the Board has previously approved.

The intent of Congress must be ascertained in answering this question since Congress had the authority to pre-empt the state's jurisdiction if it so desires.⁵³ In *Neally* the Maine court decided that

⁵¹ *Id.* at 194 n.4 states:

The approval of the Board of Governors of the Federal Reserve Board is required in such holding company reorganizations as this We share the opinion of the Supreme Court of Tennessee in *Gary v. Memphis Bank & Trust Co.* (1973), Civ. No. 77,386, and the Court of Common Pleas below, that it is for the courts of the state to define such questions of state law as may be involved in the actions of bank holding companies. In doing so, we reject the suggestion of the Supreme Court of Maine in *Neally v. Brown* (1971), 284 A.2d 480, that the federal authorities to which responsibility for all other aspects of the review and approval of proposed holding company reorganizations pass on issues of state law as well.

⁵² The analysis of the legislative history of the Act relies on the Ohio Attorney General's brief written for the Court of Common Pleas decision in the *Cleveland Trust* case.

⁵³ Most commentators agree that Congress has the power to regulate banking to the exclusion of the states. The basis for this authority could arise from any one of three Constitutional powers: power to regulate interstate commerce, U.S. CONST. art. 1, § 8, cl. 3; Power to lay and collect taxes, *id.* c. 1; or power to coin money and regulate the value thereof, *id.* cl. 5.

Congress did intend to pre-empt the state's jurisdiction in the area of bank holding companies.⁵⁴ But from a careful analysis of the legislative history of the Bank Holding Company Act it appears that Congress did not intend to pre-empt⁵⁵ the jurisdiction of the state authorities.

The original version of the Bank Holding Company Act reflected a strong anti-holding company prejudice. One section of the original act gave the appropriate state banking authority an absolute veto power over any holding company acquisitions.⁵⁶ Another section incorporated all the territorial restrictions of the state branch bank laws into the federal law.⁵⁷ This original House bill actually gave the states power *over national banks*. The indiscriminate use of the blanket veto would affect national banks as well as state banks. Moreover, the per se application of state branching restrictions would be inappropriate in many situations, as when a holding company was not acquiring all the stock of a potential subsidiary.

Congress replaced these two sections of the original bill with §

See, Redford, Dual Banking: A Case Study in Federalism, 31 LAW & CONTEMP. PROB. 749 (1966); Comment, *Branch Banking Limitation Held Applicable to Approved Bank Holding Company Operation*, 39 N.Y.U. L. REV. 686 (1964); Note, 66 YALE L.J. 1093 (1957). *supra* note 11.

⁵⁴ 284 A.2d at 485.

⁵⁵ Pre-emption is a difficult and involved subject with ramifications in all areas of federal-state conflicts. The Supreme Court has recently stated that federal legislation only pre-empts state legislation when (1) there is a need for national uniformity, (2) there is an actual conflict between the two schemes of regulation, or (3) there is evidence of a congressional intent to pre-empt the field. *Head v. New Mexico Bd.*, 374 U.S. 424 at 430 (1963).

In the area of bank holding companies the federal courts have never expressed the view that there was a need for national uniformity in bank regulation, in fact inherent in the dual banking system is an allowance for each state to choose the degree of regulation it desires. Also there is no conflict between the two schemes; therefore, if the federal law is to pre-empt the state law this pre-emption must be based on congressional intent. *See also*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963); *California v. Zook*, 336 U.S. 725 (1949). *Cf. Slain, Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U. L. REV. 263 at 299 (1970), in which the author analyzes the need for national uniformity in economic regulation of non-banking industries.

⁵⁶ Section 5(b) of H.R. 6227, 84th Cong., 1st Sess. (1955) states:

Before approving any application under this section, the Board shall give notice to . . . the appropriate supervisory authority of the State in which Applicant company or any bank the voting shares or assets of which are sought to be acquired is a state bank. If the authority so notified by the Board files its written disapproval of the application within 30 days the application shall not be granted.

⁵⁷ Section 5(c) of H.R. 6227, 84th Cong., 1st Sess. (1955) states:

Notwithstanding any other provision of this section, no application shall be approved under this section which will permit . . . (2) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank, except (i) within geographical limitations that would apply to the establishment of branches of banks

7,⁵⁹ which emerged along with § 3(d) as the supposed protectors of the states' authority.⁶⁰ Section 7 was designed to preserve the independence of both state and federal banking systems by allowing the states to maintain the control they previously had over state banks, but preventing them from encroaching on federal authority. This purpose is clearly expressed in a portion of Senate Report No. 1095, which states:

In order to clarify the legislative history of Section 7, the committee wishes to emphasize that this section does not grant any new authority to States over National Banks. The purpose of the section is to preserve to the States those powers which they now have in our dual banking system. It is always of uppermost importance in legislation of this nature to preserve the dual system of National and State Banks, and Section 7 must be viewed in that light.⁶¹

Thus, it is apparent from the Senate Report that the reason for the deletion of the original section was not to deny the states any power they already had over state banks or any power they might gain through future legislation, but to prevent the states from exercising any influence over national banks. It is interesting to note that the quoted legislative history indicates that the Board should carefully consider the views of state authorities on national bank expansion. This idea is consistent with § 36 of the National Bank Act which incorporates the state geographic restrictions on branch expansion into federal law.⁶³

The final version of the Act also rejected the automatic tie-in with the state geographical restrictions, although Congress, as indicated above, felt the restrictions should be carefully considered. Senate Report No. 1095 describes precisely why the direct tie-in was rejected. It states:

The committee decided against inclusion of a provision in the bill that would automatically apply State laws concerning branch banking to bank holding company operations. The purposes of branch banking laws are not identical with the purpose of this bill to control bank holding companies. Moreover, branch banking is mostly conducted by the use of depositors' funds, thus making the

under the law of such State, or (ii) unless such acquisition is at the time authorized by the statute law of such State by language specifically granting such authority affirmatively, and not merely by implication.

⁵⁹ See 12 U.S.C. § 1846, note 16 *supra*.

⁶⁰ 66 YALE L.J., *supra* note 11, at 1097.

⁶¹ SENATE REP. NO. 1095, 84th Cong., 2d Sess., at 5 (1956).

⁶² *Id.*

⁶³ 12 U.S.C. § 36 (1970).

protection of these funds of prime importance. Bank holding companies, however, as such have no depositors. For operating funds they have recourse to equity capital supplied by their shareholders. It is believed the bill contains adequate provisions to regulate bank holding company operations without an arbitrary tie-in with branch banking laws.⁶⁴

It appears that the deletion of the provision authorizing the automatic tie-in was clearly not intended to extend federal authority, rather it grew from an appreciation of the complexities of bank holding company arrangements and their need for individual attention.

The states before passage of the Bank Holding Company Act had the authority to enforce their own laws on bank and holding company growth and pursuant to § 7, they should retain that authority after the passage of the Act. The Senate Report, in affirming this reservation of state authority, states:

. . . [A]nother provision of this bill [§ 7] expressly preserves to the States a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders than the Federal authorities can be or are under this bill. Under such a grant of authority, each State may, within the limits of its proper jurisdiction of authority, be more severe on bank holding companies as a class than (1) this bill empowers the Federal authorities to be or (2) such Federal authorities actually are in their administration of the provisions of this bill. In the opinion of the committee, this provision adequately safeguards States' rights as to bank holding companies.⁶⁵

The effect of the deletion of the two sections from the original bill does not indicate an intent on the part of Congress to expand the jurisdiction of the Board, as the *Neally* court hypothesized, but rather an intent to preserve the authority of state officials while maintaining the dual banking system. In addition to the protection given the states through § 7, the so-called Douglas amendment, § 3(d),⁶⁶ also protects the states by forbidding the acquisition of domestic banks by foreign holding companies without specific state legislation authorizing this expansion. This section applies equally to state and national banks and indicates that Congress intended to allow the states to retain their jurisdiction over the structure of the banking industry within their state.

At this point in time it is beyond cavil that the individual states

⁶⁴ SENATE REP. NO. 1095, *supra* note 61, at 11.

⁶⁵ SENATE REP. NO. 1095, *supra* note 61, at 11.

⁶⁶ 12 U.S.C. § 1842(d) (1970).

have the authority to pass specific legislation which restricts domestic holding companies.⁶⁷ This legislation affects both national and state holding companies within the state where it is enacted. The state courts in litigation on this legislation have decided that Congress, when it passed the Bank Holding Company Act, did not manifest an intent to pre-empt the states.⁶⁸ However, the approval of this method of regulating holding companies does not exclude the possibility that regulation can be accomplished through enforcement of the state's existing banking laws.

IV. CONCLUSION

The federal case law indicates that the Comptroller has no jurisdiction over bank holding company expansion since this jurisdiction has been specifically allocated to the Federal Reserve Board. The Board is an agency with acknowledged expertise in the area and to allow intervention by the Comptroller would upset the statutory design of Congress.

The application of this analysis to state banking administrators breaks down in two specific areas. First, the legislative history of the Act demonstrates that Congress *did intend* to pre-empt the Comptroller but that it specifically *did not intend* to pre-empt state regulation.⁶⁹ Second, accepting the fact that a Congressional plan designed to bring agency expertise on an issue allocates exclusive jurisdiction, the plan in the case of state banks must be patterned within the framework of the dual banking system. Thus even if the Board's jurisdiction is exclusive among Federal authorities the dual system forces it to be concurrent with state authorities.

The vitality of the dual system rests on two concepts: (1) competitive equality between the two systems,⁷⁰ and (2) the maintenance of local regulation of domestic institutions.⁷¹ This equality is only maintained as long as all banks expand within the same set of guidelines. Congress insured this would be the case by making the state law applicable to the national banks through the McFadden Act.⁷² The federal courts have explicitly recognized that some subsidiary operations by bank holding companies amount to branch banking. In these

⁶⁷ *Braeburn Securities Corp. v. Smith*, 15 Ill. 2d 55, 153 N.E.2d 806 (1958), *appeal dismissed for lack of substantial federal question*, 359 U.S. 311 (1959); *semble* Opinion of the Justices, 102 N.H. 106, 151 A.2d 236 (1959).

⁶⁸ 15 Ill. 2d at 59, 153 N.E.2d at 810.

⁶⁹ See note 61, *supra*.

⁷⁰ See note 10, *supra*.

⁷¹ 66 YALE L.J., *supra* note 11, at 1097.

⁷² 12 U.S.C. § 36 (1970).

situations the Board, functioning as a federal instrumentality, must interpret and apply those laws, both state and federal, which it believes are relevant. However, denying the states the right to enforce their own laws subverts the goal of local regulation. To insure the preservation of local regulation and the dual system in general, one is forced to conclude that the state banking officials must have the authority to at least enforce state laws as to state institutions. Just as an incursion by the states on national banks was sought to be avoided by Congress in deleting a section from the original Bank Holding Company Act,⁷³ so should the national authorities be limited in their exclusion of state authorities from the regulation of state banks. This conclusion assumes greater weight when one recognizes that specific holding company legislation passed by the states is enforceable. Therefore, not to allow the states to enforce other banking laws amounts to drawing an arbitrary distinction between two equally enforceable state laws.

American establishes that the Board has jurisdiction to determine if a holding company subsidiary is involved in an acquisition regardless of the bank's charter and to then apply the Bank Holding Company Act and whatever other laws are applicable in that situation.⁷⁴ Similarly, after the Board has made a determination involving state banks, the state banking authorities should have jurisdiction to determine if their laws were violated. The dual banking system and § 7 of the Bank Holding Company Act require this.

It is concluded that the individual states must retain their jurisdiction over domestic banking institutions to preserve the dual banking system.⁷⁵ A removal of the state's jurisdiction precludes it from effectuating a banking structure which meets the needs and the goals that the state has defined for itself.

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⁷³ See note 56 *supra*.

⁷⁴ 503 F.2d at 788.

⁷⁵ For a full discussion of dual banking and its underlying philosophical supports. See Redford, *Dual Banking, A Case Study in Federalism*, 31 LAW & CONTEMP. PROB. 749 (1966).